STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 23, 2013
v	No. 311064 Grand Traverse Circuit Court
JOHN CHARLES MCCULLOUGH, Defendant-Appellant.	LC No. 11-011269-FC

Before: BECKERING, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

A jury convicted defendant of operating a motor vehicle while intoxicated (third offense), MCL 257.625(1); resisting a police officer, MCL 750.81d(1); operating a motor vehicle with a suspended license, MCL 257.904(1); and operating a motor vehicle without insurance, MCL 500.3102. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 46 to 240 months for operating a motor vehicle while intoxicated, 46 to 180 months for resisting a police officer, 12 months for operating a motor vehicle with a suspended license, and 12 months for operating a motor vehicle without insurance. He appeals as of right. We affirm defendant's convictions but remand for the ministerial task of correcting the judgment of sentence to accurately reflect defendant's minimum sentence of 46 months' imprisonment for his conviction of operating a motor vehicle while intoxicated.[1]

This case arises out of a July 17, 2011, incident in which defendant's van was found in a ditch. The prosecution submitted substantial evidence at trial to support a finding that defendant, while intoxicated, drove his van into the ditch and committed the other offenses with which he was charged and convicted.

[1] Defendant concedes that the trial court sentenced him to a minimum of 46 months' imprisonment for operating a motor vehicle while intoxicated, which is reflected in both the sentencing transcript and the court's entry on the Sentencing Information Report. However, defendant's minimum sentence is inaccurately reflected as 42 months in the judgment of sentence.

Defendant first argues on appeal that the trial court violated his due-process rights by limiting him to five peremptory challenges instead of twelve. Because he is an habitual offender, defendant was facing up to life imprisonment on the charge of operating a motor vehicle while intoxicated; hence, defendant claims that he was entitled to 12 peremptory challenges in accordance with MCL 768.13(1) ("A person who is being tried alone for an offense punishable by death or imprisonment for life, shall be allowed to challenge peremptorily 12 of the persons drawn to serve as jurors."). We disagree.

This Court reviews de novo the interpretation of a statute or court rule. *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004). Under MCL 768.12(1), "[a] person who is put on trial for an offense that is not punishable by death or life imprisonment shall be allowed to challenge peremptorily 5 of the persons drawn to serve as jurors." Similarly, MCR 6.412(E)(1) provides that "[e]ach defendant is entitled to 5 peremptory challenges unless an offense charged is punishable by life imprisonment, in which case a defendant being tried alone is entitled to 12 peremptory challenges . . . ." The offense of operating a vehicle while intoxicated is not, in and of itself, punishable by life imprisonment. See MCL 257.625. Long-established precedent indicates that a defendant's habitual-offender status does not affect the number of peremptory challenges to which he is entitled pursuant to statute or court rule because it does not create a substantive offense separate from and independent of the underlying principle offense. *People v Oswald (After Remand)*, 188 Mich App 1, 12; 469 NW2d 306 (1991). Contrary to defendant's contention, the *Oswald* decision is unaffected by *People v Brown*, 492 Mich 684, 687; 822 NW2d 208 (2012), where our Supreme Court held that "MCR 6.302(B)(2) requires the trial court to apprise a defendant of his or her maximum possible prison sentence as an habitual offender before accepting a guilty plea." Defendant fails to establish how *Brown*, which addresses a defendant's right to make a knowing plea, impacts his right to a certain number of peremptory challenges.

Defendant also contends that his due-process rights were violated by the trial court's practice of allowing jurors to ask questions. We disagree. Because defendant did not object at trial, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). At trial, the court instructed the jurors that they could ask witnesses questions that would first be screened by the court. One of the jurors subsequently submitted a question for the arresting officer. Defendant has failed to establish plain error because he has not presented this Court with any binding legal authority demonstrating that the practice of allowing jurors to ask questions violates due process. Indeed, such a practice is expressly permitted pursuant to MCR 2.513(I) and MCR 6.001(D); furthermore, our Supreme Court approved of such practice in *People v Heard*, 388 Mich 182, 187; 200 NW2d 73 (1972).[2]

[2] Defendant contends that the very act of permitting jurors to ask questions violates his due-process rights; he does not contend that the trial court's procedure when handling the juror's question violated MCR 2.513(I).

Finally, defendant claims that his counsel was constitutionally ineffective because he failed to object to the arresting officer's improper opinion testimony regarding defendant's guilt. We disagree.

Claims of ineffective assistance of counsel present mixed questions of constitutional law and fact. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). We review for clear error the trial court's findings of fact and de novo constitutional determinations. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). Because defendant failed to establish grounds for a *Ginther*[3] hearing, our review is limited to errors apparent in the record. See *People v Davis*, 250 Mich App 357, 368, 649 NW2d 94 (2002).

> Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense. Const 1963, art 1, § 20; US Const, Am VI. In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different. [*People v Trakhtenberg*, 493 Mich 38, 51-52; 826 NW2d 136 (2012) (citations omitted).]

It is a "settled and long-established rule that a witness cannot express an opinion concerning the guilt or innocence of a defendant." *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975); see also *People v Fomby*, ___Mich App___; ___NW2d___, issued March 19, 2013 (Docket No. 308338), slip op at 4. Rather, the issue of an individual's guilt or innocence is a question solely for the jury. *People v Suchy*, 143 Mich App 136, 149; 371 NW2d 502 (1985).

During defendant's trial, Deputy Matt Karczewski, the arresting officer, testified about his investigation of the accident and his encounter with defendant. Without objection, the following exchange occurred during the prosecution's direct examination of Deputy Karczewski:

> *Q.* Now, you said that [defendant] seemed a bit agitated, I don't know if you said agitated, but he was uncooperative. Can you describe why you felt he was uncooperative?
>
> *A.* I felt he was extremely intoxicated and that was part of the reason. And, then I felt that he was trying to just not give me his name and not cooperate because he was the drunk driver we were looking for obviously.

Even if we were to assume that defense counsel acted unreasonably by failing to object to Deputy Karczewski's unsolicited remark that he felt defendant was the drunk driver at the time of the investigation, defendant has not shown a reasonable probability of a different outcome. See *Trakhtenberg*, 493 Mich at 51. The evidence in this case was overwhelming. The van found in the ditch was defendant's vehicle. Two witnesses who came upon the scene after the van went

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

into the ditch testified that they found a person who fit defendant's general description sitting in the driver's seat of the van; moreover, the person was alone. Because the person appeared to be either stunned or inebriated, they called 9-1-1. Another witness testified that when he arrived home he saw a van in the ditch in front of his home and defendant alone in his backyard behind the gate holding keys in his hand. Defendant approached the homeowner and demanded help. He told the homeowner that he was looking for his cabin when he ran out of gas and rolled backward into the ditch. He wanted to use the homeowner's telephone. The homeowner noted that defendant was "very confused and then confrontational" and visibly intoxicated. After initially denying it, defendant ultimately admitted that he had been drinking, at which point the homeowner told defendant to leave his property. The arresting officer found defendant walking down the street about one block away from the accident. Defendant was visibly intoxicated, refused to give his name and identification, and had a half-full bottle of vodka in his pants pocket. An inventory search of defendant's van revealed a bottle of vodka and a cooler filled with ice and beer. Defendant admitted to the police officer that he had been in the van and that he had been drinking, but he claimed that a homeless man named Dave was driving. None of the witnesses ever saw anyone with defendant or anywhere near the van. Defendant's blood was drawn at Munson Medical Center almost four hours later and reflected a blood alcohol content of 0.26 grams per 100 milliliters. In light of the evidence, defendant cannot show a reasonable probability that either the arresting officer's testimony or defense counsel's failure to object to the testimony affected the outcome of his trial. In addition, the trial court instructed the jury that they must consider police testimony the same as any other testimony. "[J]urors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). In light of the overwhelming evidence in this case and the trial court's instruction to the jury, any possible prejudice did not affect the outcome of the trial. Accordingly, defendant's claim of ineffective assistance of counsel fails.

We affirm defendant's convictions but remand for the ministerial task of amending the judgment of sentence to accurately reflect defendant's minimum sentence of 46 months' imprisonment for his conviction of operating a motor vehicle while intoxicated. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Patrick M. Meter
/s/ Michael J. Riordan